Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1993

TERESA A. HARTLINE, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

Petition for Writ of Certiorari
to the United States Court
of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Jonathan Schochor,
Counsel of Record,
Philip C. Federico,
Christopher P. Kennedy,
Schochor, Federico and Staton,
1211 St. Paul Street,
Baltimore, Maryland 21202,
(410) 234-1000

Attorneys for Petitioners

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1211 St. Paul Street,
Baltimore, Maryland 21202,
(410) 234-1000

Attorneys for Petitioners

QUESTION PRESENTED FOR REVIEW

Whether the *Feres* Doctrine Should be Interpreted to Allow Petitioners' Actions, or Should be Overruled

LIST OF PARTIES

Teresa A. Hartline, individually, and as personal representative of the estate of the late James Y. Hartline;

Jeffrey Franklin Hartline, infant, by his mother and next friend Teresa A. Hartline;

Daniel J. McLean Hartline, infant, by his mother and next friend Teresa A. Hartline;

Andrew Chaplin Hartline, infant, by his mother and next friend Teresa A. Hartline;

and

Christopher James Hartline, infant, by his mother and next friend Teresa A. Hartline,

Petitioners.

The United States of America,

Respondent.

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REFERENCE TO OPINIONS BY LOWER COURTS IN THIS CASE

(1) *Teresa A. Hartline, et al. v. United States of America*, The United States Court of Appeals for the Fourth Circuit, No. 92-2556, decided February 24, 1994 before Circuit Judges Wilkinson, Hamilton, and Williams. The Circuit Court, in an unpublished *per curiam* opinion, affirmed the judgment of the United States District Court for the District of Maryland.

(2) *Teresa A. Hartline, et al. v. United States of America*, The United States District Court for the District of Maryland, Civil No. Y-92-1252, before Joseph H. Young, Senior United States District Judge. The District Court, by Memorandum Opinion and Order dated November 4, 1992, ordered that Defendant's Motion for Summary Judgment be granted, and ordered that judgment be entered in favor of United States of America.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction is vested in this Honorable Court by 28 U.S.C. §§ 1346(b) and 2671 *et seq.* Appellate jurisdiction is vested in this Honorable Court by 28 U.S.C. § 1254(1). On February 24, 1994, the United States Court of Appeals for the Fourth Circuit, in an unpublished opinion, affirmed the judgment of the United States District Court for the District of Maryland against the Petitioners in this case. This Petition is filed as a result of that affirmation of judgment by that federal appellate court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The Federal Tort Claims Act, codified at 28 U.S.C. §§ 1346(b), 2671 *et seq.*

MISCELLANEOUS

Cain, "Military Medical Malpractice and the *Feres* Doctrine," 20 Ga.L.Rev, 497, 518-520 (1985).

STATEMENT OF THE CASE

On May 1, 1992, Petitioners Teresa Hartline, individually, as personal representative of the estate of the late James Hartline, and as parent and next friend of her four minor children, filed a complaint against Respondent in the United States District Court for the District of Maryland. The complaint, brought under the Federal Tort Claims Act (the "FTCA") 28 U.S.C. §1346(b) and 2671 *et seq.*, alleged that the Decedent, James Hartline, who was a Captain in the United States Army, received negligent medical care from military physicians and military health care facilities. As a result of this negligence, Captain Hartline's condition seriously worsened and ultimately culminated in his death on February 9, 1990. The complaint contained a survival action brought by the personal representative of his estate, and wrongful death actions brought by the surviving wife and four minor children.

Respondent moved for summary judgment on the ground that Petitioners' actions were barred by, *inter alia*, the *Feres* doctrine. Upon consideration of this motion, Petitioners' Response in opposition thereto and supplemental submissions by Respondent, the District Court, without hearing oral argument, granted Respondent's motion.

Petitioners then noted an appeal to the United States Court of Appeals for the Fourth Circuit. The parties filed their respective briefs. Upon consideration of the Petitioners' Brief and the Respondent's Brief, as well as the Joint Appendix, the Fourth Circuit Court of Appeals, without hearing oral argument, affirmed the District Court's judgment in an unpublished *per curiam* opinion.

Petitioners then filed this Petition for Writ of Certiorari with this Honorable Court.

ARGUMENT

I. FACTUAL BACKGROUND

James Hartline, the Decedent, was a 33-year-old Captain in the United States Army. He entered the military in September 1981 and, over the course of nine years, developed a distinguished military record. In 1989 he and his family settled in Maryland, where he was stationed at the Aberdeen Proving Ground on active duty. At all times referred to herein, Mr. Hartline's attempts to obtain proper medical care and treatment were not actions incident to service or performance of duty under orders.

Mr. Hartline enjoyed excellent health until 1989. In the summer of 1989, he began to experience dizziness, fatigue and loss of appetite. On August 7, 1989 he sought medical assistance at the Kirk U.S. Army Health Clinic at Aberdeen Proving Grounds. He complained of severe headaches, faintness and nausea. The physicians there failed to take an adequate history, failed to perform

an adequate physical examination, and failed to order appropriate diagnostic tests. In fact, no cranial tests or studies were ordered on that day or at any subsequent time until January 26, 1990, when it was clearly too late.

By December, Mr. Hartline's headaches, exhaustion and dizziness had not abated, although he had been advised by his physicians that he had a temporary, non-life threatening condition. He returned to the Kirk Health Clinic, where he gave his history and complained of cervical pain and stiffness in the neck. Again, no cranial evaluation was performed, and he was sent home. Throughout the rest of December 1989, Mr. Hartline continued with his signs and symptoms.

In January 1990, Mr. Hartline returned to the Kirk Health Clinic. There, the attending physician referred him to Walter Reed Army Medical Center for an ear, nose and throat examination to rule out "vertigo." On January 3, 5 and 8 the Hartlines attempted to

schedule an appointment at Walter Reed, but they were advised that there would be a three week delay. In view of his continuing symptoms and the three week delay for an appointment, Mr. Hartline went to the Walter Reed Hospital Emergency Room. After providing his history, which included pain in the back of his head as well as continuing vomiting and nausea, he was diagnosed with "vertigo" and negligently discharged, with no proper diagnostic studies or tests.

On January 23, Mrs. Hartline brought her husband back to the Emergency Room at Walter Reed. She conveyed her husband's history, and she actually requested a computerized axial tomography (CAT) scan of the head. It was not done, and he was again negligently discharged with no diagnostic tests or studies.

The following day, Mr. Hartline was taken to Kirk Health Clinic Emergency Room. There, the treating physician informed Mrs. Hartline that Mr. Hartline should be admitted

to a hospital. He was taken by ambulance to Kimbrough Army Community Hospital in Fort Meade, Maryland. No appropriate cranial tests or studies were performed.

On January 26, Mr. Hartline was transferred by ambulance to Walter Reed Army Medical Center. There, physicians finally performed a CAT scan, which revealed a right cerebral cyst that had been present for months and had been causing all of Mr. Hartline's symptoms. Upon timely diagnosis, this fluid-filled cyst, which was benign, could have been removed, enabling Mr. Hartline to return to a normal, active life with no neurological deficits.

As a result of the military physicians' negligent failure to diagnose the presence of the cyst in a timely fashion, the cyst expanded, causing increased intracranial pressure, from which Mr. Hartline ultimately died on February 9, 1990.

The failure of Mr. Hartline's treating physicians to diagnose and treat this cyst in

a timely fashion clearly constitutes medical negligence. Accordingly, Mr. Hartline's estate, surviving wife and four surviving children brought suit in the United States District Court for the District of Maryland. Respondent United States of America moved for summary judgment on the grounds that this action is barred by the *Feres* doctrine, and the District Court granted that motion. In turn, the Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. That federal appellate court affirmed the judgment of the district court. Accordingly, the Petitioners filed this Petition for Writ of Certiorari, seeking review by this Honorable Court.

II. THE FERES DOCTRINE SHOULD BE INTERPRETED TO ALLOW PETITIONERS' CLAIMS, OR SHOULD BE OVERRULED

A. Under the Doctrines Established in the Brooks and Feres Cases, the Decedent Did Not Suffer His Injuries "Incident to Service."

In 1946 Congress swept away much of the sovereign immunity of the United States with

its passage of the Federal Tort Claims Act (FTCA), which permits recovery of money damages "where the United States, if a private person, would be liable to the claimant...." 28 U.S.C. § 1346(b).

Any analysis of the application of the Federal Tort Claims Act to members of the military begins with *Brooks v. United States*, 337 U.S. 49 (1949), the first decision rendered by the United States Supreme Court on this subject.

In that case, brothers Welker Brooks and Arthur Brooks, both of whom were off-duty members of the armed forces, were riding in their automobile along a public highway in North Carolina on a dark, rainy night in February 1946. As their automobile entered an intersection, it was struck by a United States Army truck driven by a civilian employee of the Army. *Id.* at 50. Welker Brooks was badly injured and Arthur Brooks was killed. Welker Brooks and the administrator of Arthur Brooks' Estate

brought actions against the United States in District Court. The government moved to dismiss on the grounds that Welker Brooks and his deceased brother were in the armed forces of the United States at the time of the accident, and were therefore barred from recovery. The District Court denied the motions but the Fourth Circuit Court of Appeals reversed. *Id.* at 50-51.

The Supreme Court, in turn, granted certiorari and reversed, in favor of the Brooks' action. As the Court phrased the issue, "The question is whether members of the United States armed forces can recover under that Act (the Federal Tort Claims Act) for injuries not incident to their service." *Id.* at 50. After examining the Act's language, legislative history and purpose, the Court found that, despite their status as members of the armed forces, the claims were not barred. The Court ruled that:

> (t)he statute's terms are clear. They provide for District Court jurisdiction

> over *any* claim founded on negligence brought against the United States. We are not persuaded that "any claim" means "any claim but that of servicemen."

Id. at 51.

The Court noted that the Act contained explicit exceptions, including claims arising out of combatant activities of the military or naval forces during time of war. *Id.* The Court consequently declared:

> such exceptions make it clear to us that Congress knew what it was about when it used the term "any claim." It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

Id. at 51.

In addition to the statute's language, the Court observed that the legislative history of the FTCA further evidenced congressional intent to accord military service members a right of action. Of the eighteen tort claims bills introduced in

Congress between 1925 and 1935, all but two contained exceptions denying recovery to members of the armed forces. When the FTCA "was first introduced, this exception concerning servicemen had been dropped." *Id.* at 52. The Court also rejected the government's argument that disability payments supplanted any right of action, explaining that:

> (u)nlike the usual workman's compensation statute,... there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy.... Nor did Congress provide for an election or remedies, as in the Federal Employees' Compensation Act....We will not call either remedy in the present case exclusive, nor pronounce a doctrine of remedies, when Congress has not done so. (Citations omitted).

Id. at 53.

The Court permitted the amount of benefit payments to be deducted from any award under the FTCA, *id.* at 53-54, but refused to consider such payments an

exclusive remedy. The Court thus found a congressional purpose of allowing full recovery for members of the military under the FTCA. In the course of this analysis, the Court noted in dictum that:

> (w)ere the accident incident to the Brooks' service, a wholly different case would be presented....The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.

Id. at 52-53.

This "incident to service" dictum became law a year later in *Feres v. United States*, 340 U.S. 135 (1950), where the Court held that service members could not recover for injuries that "arise out of or are in the course of activity incident to service." *Id.* 146. In so ruling, the Court explicitly preserved its earlier holding in *Brooks*,

declaring that:

> The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, *under compulsion of no orders or duty and on no military mission*....Brooks' relationship while on leave was not analogous to that of a soldier injured *while performing duties under orders*. (Emphasis added).

Id. at 146.

By reading *Brooks* and *Feres* together and by giving effect to both decisions, one may reasonably conclude that "activity incident to service" means a serviceman's *performance of duties under orders*. This interpretation conforms with the three rationales underlying the *Feres* doctrine as articulated by the *Feres* Court. The first rationale was the "distinctively federal nature of the relationship between the government and members of the armed forces." Under this rationale, the *Feres* Court deemed language of the FTCA inapplicable to servicemen incident to service because there

was no situation where the United States, if a private person, would be liable: private persons do not raise armies "with such authorities over persons as the Government vests in echelons of command." *Id.* at 141-42.

This rationale, however, applies only when the serviceman is in the unique situation of performing military duties under orders. When, as here, the injury results from medical negligence, there is clear parallel liability: the disease arises irrespective of one's military or civilian status, and any civilian physician or civilian hospital would be held liable for the negligent failure to timely diagnose the disease process ailing Mr. Hartline. This "federal relationship" rationale also argues that Congress could not have intended state law to control because this would undermine the military's need for uniformity in its governing standards. *Id.* at 143. This rationale, however, did not prevent

imposition of liability in the *Brooks* case, where the members of the armed forces were not performing duties under orders. As Justice Scalia, later dissenting in *United States v. Johnson*, 481 U.S. 681 (1987) observed:

> we have effectively disavowed this "uniformity" justification -- and rendered its benefits to military planning illusory -- by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting *civilians* to recover for injuries caused by military negligence.

Id. at 696.

Consequently, the "federal relationship" rationale should be interpreted consistently with the *Brooks* and *Feres* decisions to permit members of the armed forces to bring suit when their injuries result from activities other than performance of duties under orders.

The second rationale for barring recovery for injuries suffered incident to

service is the fear of damaging military structure and discipline. This rationale, conceived after the *Feres* decision and currently cited as the principal explanation for that decision, argues that military discipline would be undermined and civilian courts would be required to second-guess military decision making. If service members were allowed to sue the government, so the argument goes, the "trial would, in either case, involve second-questioning military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) cited in *United States v. Shearer*, 473 U.S. 52, 57-58 (1985).

If anything, this rationale emphasizes the fact that the "incident to service" criterion refers to performance of duties subject to orders. Since, as in *Brooks*, Mr. Hartline's injury resulted from activity other than performance of his duties, there

is no threat of undermining military discipline, and civilian courts would not be required to second-guess military decision making. Thus, if the *Brooks* and *Feres* doctrines are interpreted in light of their supportive rationales, they would not bar recovery in a medical negligence action, since a service member's undiagnosed disease process may arise irrespective of military or civilian status (absent wounds from combat) and the provision of health care to the servicemen involves no military decision making.

As one commentator has noted:

> Although the military discipline rationale may justify barring some actions by servicemen, it has no application to the medical malpractice claims or servicemen. Allowing a cause of action for claims of negligence in peacetime government hospitals would not require courts to examine the propriety of military decisions, nor would it pose a threat to the "special relationship" of the soldier to his superior officers. The

military medical environment is largely removed from the mainstream of military activities and is free from many of the trappings that characterize service life. No other aspect of the military more closely resembles its civilian counterpart than does the setting in a peacetime government hospital.

Medical malpractice actions are different than most other actions asserted by servicemen against the government. Malpractice suits do not question the reasonableness of military orders or commands. The essence of the discipline rationale is the fear that claims by armed forces personnel would allow civil courts to second-guess military decisions. It is believed that the potential threat of lawsuits would interfere with the need for "unhesitating and decisive action" by military commanders. While it is possible to foresee the problems that might occur if officers were held liable for negligent orders given during combat, it seems highly unlikely that medical malpractice claims would jeopardize discipline in the same manner. The principal inquiry in a malpractice action is whether the medical treatment rendered

> by a physician conforms to the proper standard of care, which is the knowledge and skill ordinarily employed by other members of the profession in similar circumstances. The common law of medical malpractice already grants the leeway necessary for the exercise of medical discretion through the relatively stringent burdens it imposes on plaintiffs. Since military malpractice suits would question the medical, rather than military judgment of government physicians, they require no more discretion than is afforded civilian doctors.

Cain, "Military Medical Malpractice and the *Feres* Doctrine," 20 Ga.L.Rev. 497, 518-520 (1985).

The third and last rationale in support of barring recovery under the FTCA was the availability of existing alternate compensation schemes for the military. As has been noted, however, the *Brooks* decision specifically addressed this rationale and held that it was inapplicable, as Congress had not required an election of remedies. *Brooks v. United States*, *supra* 337 U.S. at 53. The Court indicated, however, that

alternative compensation schemes could be taken into account in adjusting recovery under the FTCA. In *United States v. Brown*, 348 U.S. 110 (1954) the Court emphasized that:

> Congress could, of course, make the compensation system the exclusive remedy....We noted in the *Brooks* case, 337 U.S. 49, 53, that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veteran's Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act. We adhere to that result.

Id. at 113.

As Justice Scalia observed in *United States v. Johnson supra*, "*Brooks* and *Brown* (neither of which has ever been expressly disapproved) plainly hold that the VBA is *not* an 'exclusive' remedy which places an 'upper

limit' on the Government's liability." 481 U.S. at 698.

Thus, none of the rationales advanced by the government warrants disallowing service members from seeking recovery pursuant to the FTCA when their injuries are sustained from activity other than performance of their duties. In such a circumstance, the injuries are not "incident to service," and recovery should be allowed. The language of the FTCA itself implies that medical negligence is a circumstance for which recovery should be permitted. In *United States v. Brown, supra* 348 U.S. 110, a case involving allegations of medical negligence, the Court observed:

> That Act [the FTCA] provides that, "The United States shall be liable...in the same manner and to the same extent as a private individual under like circumstances...." 28 U.S.C. §2674. The *Feres*
>
> case emphasized how sharp would be the break in tradition if the

> claims there asserted were allowed against the United States, the Court noting that the effect of the Tort Claims Act is "to waive immunity from recognized causes of action," "not to visit the Government with novel and unprecedented liabilities." 340 U.S. 135, 142. But that cannot be said here. Certainly this claim is one which might be cognizable under local law, if the defendant were a private party. Responsibility of hospitals to patients for negligence may not be as notorious as the liability of the owners of automobiles. But the doctrine is not novel or without support. (Citations omitted).

Id. at 112-13.

The same reasoning that would permit the estate of Mr. Hartline to maintain this action would, in like manner, permit his surviving wife and minor children to maintain their wrongful death suits against the Respondent. If, as Petitioners urge, the totality of the circumstances indicates that the service member suffered the injury from

activity that was not incident to service, the three aforementioned rationales do not apply, and the suits of his surviving spouse and children should be permitted. *Cooper v. Perkiomen Airways, Ltd.*, 609 F. Supp. 969 (D.C. Pa. 1985); *Adams v. United States*, 728 F.2d 736 (5th Cir. 1984).

Petitioners respectfully suggest that if a servicemember receives negligent medical treatment in a peacetime, non-combat environment when he is not under orders and his activities are not incident to service, he should be permitted to maintain a suit against the government for damages, as is the right of any other United States citizen. To permit such a suit to proceed in no way compromises the underlying rationale of the *Feres* doctrine, and confirms the intent of Congress when the FTCA was passed.

If, as this Honorable Court recognized in *Brooks v. United States, supra*, the Federal Tort Claims Act grants to Courts jurisdiction over any claim founded on

negligence brought against the United States -- not "any claim but that of servicemen" 337 U.S. at 51, then a reasonable interpretation would permit a serviceman under these circumstances to maintain a suit for damages, as is the right of any other United States citizen. It is respectfully submitted that such an interpretation comports with Congress' statutory language and apparent intent. Petitioners respectfully request that they be permitted to maintain their actions.

B. If the Doctrines Established in Brooks and Feres Are Not Construed to Permit This Action, Then the Feres Doctrine Should be Overruled.

In *United States v. Johnson*, 481 U.S. 681 (1987), the respondent's husband, a helicopter pilot for the Coast Guard, was killed when his helicopter crashed during a rescue mission, due to the alleged negligence of air traffic controllers working for the Federal Aviation Administration. The Supreme Court, (Powell J.) held that because this

serviceman was killed during the course of an activity incident to service, the complaint by his surviving spouse was barred by the *Feres* doctrine. The Court reviewed the rationales advanced in support of this doctrine, and noted that:

> This federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service.
>
> * * *
>
> In this case, Lieutenant Commander Johnson was killed while performing a rescue mission on the high seas, a primary duty of the Coast Guard....There is no dispute that Johnson's injury arose directly out of the rescue mission, or that the mission was an activity incident to his military service. Johnson went on the rescue mission specifically because of his military status. His wife received and is continuing to receive statutory benefits on account of his death. Because Johnson was acting pursuant to standard operating procedures of the Coast Guard, the potential that this suit could implicate military discipline is substantial. The circumstances of this case

> thus fall within the heart of the *Feres* doctrine as it consistently has been articulated.

Id. at 689-92.

Unlike the present case, *Johnson* involved a service member whose claim arose directly from the performance of his duties. In this case, by contrast, the injury resulted from clear medical negligence which has nothing to do with the Decedent's military status.

If this case is deemed to fall within the ambit of the *Feres* doctrine, Petitioners respectfully request that the doctrine be overruled for the reasons set forth herein and for those reasons set forth in Justice Scalia's dissent in *United States v. Johnson*. *Id.* at 692-703. After reviewing the history of the doctrine, and the rationales advanced in its support,, Justice Scalia concluded:

> In sum, neither the three original *Feres* reasons nor the *post hoc* rationalization of "military discipline" justifies our failure to apply the FTCA as written. *Feres* was

> wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received.

Id. at 700.

As Justice Scalia also noted, the Supreme Court had not been asked to overrule the *Feres* doctrine in *United States v. Johnson*. *Id.* at 703. The need for such a ruling can be avoided here if the reach of the *Feres* doctrine were limited to its rationales. However, if an exception cannot be created for maintenance of suits such as here, the Petitioners respectfully request that the *Feres* doctrine be overruled.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the *Feres* doctrine be interpreted to permit maintenance of their cases, or be overruled, and that this Honorable Court reverse the decision entered by the United States Court of Appeals for the Fourth Circuit affirming the judgment of the

United States District Court for the District of Maryland.

Respectfully submitted,

Jonathan Schochor

Jonathan Schochor, Counsel of Record

Philip C. Federico

Philip C. Federico

Christopher P. Kennedy

Schochor, Federico and Staton, P.A.

Schochor, Federico and Staton, P.A.
The Paulton
1211 St. Paul Street
Baltimore, Maryland 21202
(410) 234-1000

Attorneys for Petitioners

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TERESA K. HARTLINE, et al.	*	
	*	
v.	*	CIVIL NO. Y-92-1252
UNITED STATES OF AMERICA	*	
	*	

Philip C. Federico, Esquire, Baltimore, Maryland, Jonathan Schochor, Esquire, Baltimore, Maryland, and David K. Heasley, Esquire, Baltimore, Maryland, counsel for Plaintiff.

Richard D. Bennett, Esquire, United States Attorney for the District of Maryland, Baltimore, Maryland, and James G. Warwick, Esquire, Assistant United States Attorney, Baltimore, Maryland, counsel for Defendant.

YOUNG, Joseph H., Senior United States District Judge

Date: November 4, 1992

MEMORANDUM

The estate and family of James Hartline (Hartline), a member of the United States Army, filed this medical malpractice action

against the United States (U.S. or Government) after Hartline died of a brain tumor at an Army Hospital. The U.S. seeks Summary Judgment, claiming that *Feres v. United States*, 340 U.S. 135 (1950) bars recovery by Hartline's estate and family. The Government also argues that the claims filed on behalf of Hartline's children are barred for failure to exhaust administrative remedies since the administrative claim only listed Hartline's wife as a claimant.

FACTS

James Hartline was a Captain on active duty status in the U.S. Army when he began to experience headaches, faintness, and nausea in the summer of 1989. He sought medical treatment at the Kirk U.S. Army Health Clinic (Kirk) periodically through 1989, and allegedly received insufficient evaluation and incorrect diagnoses. By January, 1990, the deceased's health deteriorated, requiring two visits to the emergency rooms at Kirk and

Walter Reed Army Medical Center (Walter Reed). On one of these occasions, Teresa Hartline (widow), wife of the deceased, asked the treating physician to perform a computerized axial tomography (CAT scan) which was allegedly not done. On a subsequent visit to the emergency room, Hartline was admitted to the hospital. The treating physicians performed a CAT scan shortly thereafter, and discovered a right cerebral cystic tumor. Although Hartline underwent surgery for the tumor, he died on February 9, 1990 from intracranial pressure from the tumor.

Hartline's widow filed an administrative claim in her own name, requesting damages totally $15,000,000: $5,000,000 for personal injury and $10,000,000 for wrongful death. The Government denied these claims and the widow filed the present action. The Complaint, filed under the Federal Tort Claims Act (FTCA), requests damages totalling $15,000,000: $5,000,000 for personal injury

on behalf of Hartline, and $2,000,000 each for the widow and her four children. The Complaint states state law claims for the family members that are independent from those filed on behalf of Hartline.

The Government argues in its Motion for Summary Judgment that the *Feres* doctrine bars the claims of Hartline, his widow, and their children, and that the children's claims are also barred for failure to exhaust administrative remedies.

DISCUSSION

I. Feres Doctrine Prohibits Recovery for Claims on Behalf of Hartline

The FTCA authorizes recovery from the Government for injuries caused by the negligent or wrongful acts of federal personnel acting within the scope of their federal employment. 28 U.S.C. § 1346(b). However, the FTCA does not redress injuries to servicemen that arise out of activity incident to military service. *Feres*, 340

U.S. at 146 (Government not liable to servicemen in tort because of federal relationship between soldier and U.S., comprehensive benefits programs for military, and fear of judicial inquiry into military decisions). Injuries to active duty servicemen that result from medical malpractice are considered "incident to military service." *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989). Since it is undisputed that Hartline was on active duty status at the time of the alleged malpractice, his Personal Representative's claims for funeral expenses and pain and suffering are barred. Five other Appellate Courts concur with the Fourth Circuit. *See Loughney v. United States*, 839 F.2d 186 (3d. Cir. 1988); *Sidley v. United States Dep't of Navy*, 861 F.2d 988 (6th Cir. 1988); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987); *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987).

The cases not in agreement cited by Plaintiff involve facts distinguishable from *Appelhans* through unique circumstances of formality or mere timing that separated the servicemen from civilian status. *See Adams v. United States*, 728 F.2d 736 (5th Cir. 1984); *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988); *Cooper v. Perkiomen Airways, Ltd.*, 609 F.Supp. 769 (D.C.Pa. 1985). Plaintiff also relies on the dissent in *United States v. Johnson*, 481 U.S. 681 (1987) (*Feres* doctrine bars FTCA action on behalf of a service member killed during a activity incident to service, even if the alleged negligence is by civilian employees of federal government.).

Although Hartline was on the Temporary Disability Retirement List (TDRL) for the last nine days of his life, actions alleging medical malpractice to soldiers on the Army's TDRL are barred by *Feres*. *Kendrick v. United States*, 877 F.2d 1201 (4th Cir. 1989).

II. Feres Doctrine Bars Claims by Family of Hartline

Neither the Supreme Court nor the Fourth Circuit has explicitly held that the *Feres* doctrine bars the independent claims of family members when servicemen are injured by the Government's medical malpractice. However, there is persuasive authority to prohibit the claim.

The Supreme Court has held that the right of a third party to recover in an indemnity action against the Government (recognized in *U.S. v. Yellow Cab Co.*, 340 U.S. 543 (1951)) is limited by the *Feres* doctrine where the injured party is a serviceman. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977)(Third party seeking redress was supplier of allegedly defective combat equipment and injury was incurred on active duty.). The Supreme Court has also held that an FTCA suit brought by the mother of an Army private who had been murdered by another serviceman whom the Army allegedly negligently failed to

control was barred because it required a civilian court to second-guess military personnel decisions. Although the analogous Supreme Court decisions are distinguishable because they bar judicial inquiry into military combat decisions and personnel policies, they provide authority for applying the *Feres* doctrine to third-party claims.

The First and Ninth Circuits have explicitly held that third parties may not maintain independent actions based on the medial malpractice claims of serviceman. *DeFont v. United States*, 453 F.2d 1239 (1st Cir.1972)(U.S. not liable for alleged malpractice on servicemen even though Plaintiffs claimed separate and independent cause of action under Puerto Rican law and deceased's widow claimed damages for an independent tort based on mental anguish arising from observations of inadequate care given her husband.); *Van Sickel v. United States*, 285 F.2d 87 (9th Cir. 1960)(Where servicemen could not have recovered for

government medical malpractice under FTCA, neither can widow and children, though California statute allows heirs and personal representatives independent actions.).

Two Circuit Courts and the District Court of Maryland have barred family FTCA claims for injuries to servicemen under circumstances other than medical malpractice. *See In re Agent Orange Product Liability Litigation v. United States*, 818 F.2d 201 (2d Cir. 1987)(*Feres* doctrine bars court from exercising jurisdiction over direct claims against government of wives and children of servicemen exposed to Agent Orange in Vietnam.); *Gaspard v. United States*, 713 F.2d 1097, 1101 (5th Cir. 1983)(FTCA claims of separate and independent emotional distress as result of soldiers'/husbands' exposure to radiation in atmospheric atomic weapons tests barred by *Feres* because "no claims may be brought under the FTCA for any acts of the armed forces against its military personnel."); *Sigler v. LeVan*, 485 F.Supp. 185 (D.Md. 1980)(*Feres* doctrine bars suit

brought by widow and daughter against Government and its agents for death of army counterintelligence agent, who died after intensive questioning by Army about his plans to write memoirs.). Although these cases may be distinguished because they bar judicial intrusion under circumstances that implicate more strategic military decisions, they add to the weight of authority applying *Feres* to third-party claims.

The Plaintiff analyzes the case with reference to the *Feres* rationales, and concludes that limiting *Feres* here would not undermine military decisions or the government's relationship with military personnel. In the alternative, Plaintiff recommends that *Feres* be overturned. Since the weight of authority applies *Feres* to Plaintiffs' individual claims, the Defendant's Motion for Summary Judgment must be granted. As stated in *Appelhans*, "the fact that the [*Feres*] doctrine may in many cases lead to undeniably harsh results does not relieve this court of its obligation to

apply precedent." 877 F.2d at 313.

Having held that the *Feres* doctrine prohibits recovery for medical malpractice for the individual claims of Hartline's widow and children, it is not necessary to consider whether or not the children's claims are barred for failure to exhaust administrative remedies.

Joseph H. Young
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TERESA K. HARTLINE, et al.	*	
	*	
v.	*	CIVIL NO. Y-92-1252
UNITED STATES OF AMERICA	*	
	*	

ORDER

In accordance with the attached Memorandum it is this 4th day of November, 1992, by the United States District Court for the District of Maryland, ORDERED:

1. That the Defendant's Motion for Summary Judgment BE, and the same IS, hereby GRANTED;

2. That Judgment BE, and the same IS, hereby entered in favor of the United State of America; and

3. That a copy of this Memorandum and Order be mailed to counsel for the parties.

Joseph H. Young
Senior United States
District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

TERESA A. HARTLINE, Individually, and as personal representative of the estate of the late James Y. Hartline; JEFFREY FRANKLIN HARTLINE, infant by his mother and next friend Teresa A. Hartline; DANIEL MCLEAN HARTLINE, infant by his mother and next friend Teresa A. Hartline; ANDREW CHAPLIN HARTLINE, infant by his mother and next friend Teresa A. Hartline; CHRISTOPHER JAMES HARTLINE, infant by his mother and next friend Teresa A. Hartline, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 92-2556

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge
(CA-92-1252-Y)

Submitted: June 9, 1993

Decided: February 24, 1994

Before WILKINSON, HAMILTON, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Jonathan Schochor, Philip C. Federico, David K. Heasley, SCHOCHOR, FEDERICO & STATON, Baltimore, Maryland, for Appellants. Richard D. Bennett, United States Attorney, James G. Warwick, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Teresa A. Hartline, representing herself and her minor children and suing also as the personal representative of her late husband's estate, filed this survivor's and wrongful death action against the federal government under the Federal Tort Claims Act. Hartline claimed that Army physicians negligently treated her husband's cerebral tumor. Her husband was a captain in the United States Army. The district court granted the Government's motion for summary judgment and we affirm.

Our review of the parties' briefs, the record submitted on appeal, and the district court's opinion discloses that this appeal is without merit. Injuries sustained by military personnel as a result of medical treatment at military facilities by military doctors are injuries occurring "incident to

service"; recovery for such injuries is barred under the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). *Appelhans v. United States*, 877 F.2d 309, 311 (4th Cir. 1989). Tort recovery is also barred to a serviceman on the Army's Temporary Disability Retirement List ("TDRL"). *Kendrick v. United States*, 877 F.2d 1201, 1205-06 (4th Cir. 1989), *cert. dismissed*, 493 U.S. 1065 (1990). Moreover, the *Feres* doctrine bars suits by a service member's family for claims that are derivative to the service member's action for injuries sustained "incident to service." *Id.* at 1207.

Therefore, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED